**Harry Sann, Jr. and Winton R. Wagner, Partners d/b/a Briarcliff Pavilion for Specialized Care *and* Service Personnel and Employees of the Dairy Industry, Teamsters Local Union No. 205 of Pittsburgh, Pennsylvania, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Case 6-CA-14161

March 31, 1982

## DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND JENKINS

On September 9, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions[1] and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Harry Sann, Jr. and Winton R. Wagner, Partners, d/b/a Briarcliff Pavilion for Specialized Care, North Huntingdon, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] Although we agree with the Administrative Law Judge's findings that Respondent violated Sec. 8(a)(5) and (1) of the Act, we do not adopt his finding that Respondent in its brief does not contest that the issue of union fees and dues is a nonmandatory subject of bargaining, and that it does not contest the General Counsel's argument that a proposal for an agreement of approximately 3-1/2 months' duration is evidence of bad-faith bargaining.



## DECISION

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard by me in Pittsburgh, Pennsylvania, on June 16-19, 1981, based on an unfair labor practice charge filed on January 7, 1981, by Service Personnel and Employees of the Dairy Industry, Teamsters Local Union No. 205 of Pittsburgh, Pennsylvania, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union). The complaint thereon, issued on March 26, 1981, as amended at the hearing, alleges that Respondent Harry Sann, Jr. and Winton R. Wagner, Partners, d/b/a Briarcliff Pavilion for Specialized Care, has failed and refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act by unilaterally increasing the wages of its employees on May 8, 1980, and by otherwise bargaining in bad faith by the totality of its conduct, and by particular acts in September 1980. Respondent denied that it violated the Act in any manner and alleged, in particular, an affirmative defense that the allegation of a unilateral increase of wages is time-barred under Section 10(b) of the Act. I have considered the entire record herein,[1] including my impressions of the demeanor of the witnesses, and the briefs submitted by the General Counsel and Respondent in making this Decision.

Respondent is a partnership with an office and place of business located in North Huntingdon, Pennsylvania, where it engages as a health care institution in the operation of a nursing home providing medical and professional care services for the elderly. During the 12-month period ending January 31, 1981, Respondent, in the course and conduct of its operations described above, derived gross revenues in excess of $250,000 and purchased and received at its facility products, goods, and materials valued in excess of $5,000 directly from points outside the Commonwealth of Pennsylvania. I conclude, as Respondent admits, that it is now and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(15) of the Act. I further conclude, as Respondent admits, that the Union is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

On January 8, 1980,[2] the Union was certified as the exclusive collective-bargaining representative of the following employees in an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time housekeeping employees, laundry employees, dietary employees, nurses' assistants and physical therapy aides, em-

[1] The General Counsel moved to delete Resp. Exh. 30 for identification from the record because it was neither offered nor received in evidence. There being no opposition, the motion is granted.

[2] All dates set forth hereinafter refer to the year 1980, unless otherwise stated.

ployed by the Employer at its North Huntingdon, Pennsylvania, facility; excluding office clerical employees, maintenancemen, licensed practical nurses, registered nurses, students and guards, other professional employees and supervisors as defined in the Act.

At all times since then, the Union has been and is the exclusive representative of the employees in the above-quoted unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

The initial stages of negotiations after the Union's certification were marked by both the usual and the unusual. As is characteristic, the Union submitted a typed proposal to Respondent and Respondent reviewed the same at negotiations held on February 4, submitted counterproposals on certain items, and agreed to a number of proposals. The unusual occurred at the next two negotiating sessions of February 12 and February 18, when Union President William Lickert engaged in physical altercations, first with Respondent's attorney Timothy G. Hewitt, and later with Thomas L. Hewitt (Hewitt), Respondent's principal negotiator and Timothy's father. As a result, Respondent thereafter refused to meet and negotiate with Lickert and meetings held thereafter, in the presence of mediators[3] from the Federal Mediation and Conciliation Service (FMCS) on March 12, April 4, and April 30, were conducted with the parties placed in separate rooms, with the mediator shuttling from one room to another.

In the meantime, the Union struck Respondent on April 7, and it was not until May 8 that some of the strikers returned to work, at which time Respondent increased their wages. It is that increase which the General Counsel alleges violated Section 8(a)(5) of the Act on the ground that the parties were not at impasse at the time. The supporting proof by the parties is sharply at odds. The General Counsel's case rests fundamentally upon the following facts: that the parties had agreed to resolve noneconomic issues before negotiating economic items; that there were no negotiations regarding wages at the meetings of February 4, 12, and 18, and March 12; that Respondent first submitted its wage proposal on April 25; that the Union rejected that proposal as an insult to its intelligence; and that there was no further bargaining prior to the implementation of the increase, which Respondent never made known to the Union. Only during the course of investigation of the Union's unfair labor practice charges in 1981 was it revealed that wages had been increased—until then, the Union had no knowledge of such an increase.

Respondent, on the other hand, contends that the Union, immediately after the altercation of February 18, gave notice to Respondent that it would commence a strike, but without giving the notice required by Section 8(g) of the Act. Upon advice by Respondent that proper notice had not been given, the Union canceled the strike. The Union then gave notice that a strike would commence on April 7, and Respondent, in order to avoid that confrontation, submitted at a negotiating session held on April 4 a complete contract proposal containing the wage increase which was subsequently granted and which was rejected by the Union as "an insult to our intelligence," as was almost all of Respondent's package. It was on April 30 that, having made no progress in negotiations, Hewitt explained to the mediator that Respondent was going to hire new employees as replacements for the strikers and that it was going to implement the wage offer presented in its April 4 proposal. Respondent argues, therefore, that by May 8, there was an impasse in negotiations and that the Union's unfair labor practice charge of January 7, 1981, 8 months after the fact, was barred by the 6-month limitation period set forth in Section 10(b) of the Act.

There is little dispute between the parties regarding the state of the law. If the Union had knowledge that wages had been increased more than 6 months before the filing of its charge, Section 10(b) controls. But the testimony of Respondent's witnesses as to the pre-May 8 phase of negotiations, even if credited (and I so credit it), shows nothing more than a threat to, or an indication that it would, increase wages. It does not constitute notice to the Union that wages were, in fact, increased. In all negotiations held after May 8, there is but one indication that Respondent made known the fact that wages were increased. Hewitt believed he made such a representation when he questioned whether the Union's demand for 45 or 55 cents per hour included the 30 cents which had already been granted. Assuming that I believed this testimony (and I do not), Hewitt could not have made any mention of the increase prior to September 8, the first time the Union's wage proposals were presented *and* discussed. September 8 was within the applicable 10(b) period. I therefore dismiss Respondent's 10(b) defense. *American Bakeries Co., Inc.*, 249 NLRB 1249, 1256 (1980); *City Roofing Co., et al.*, 222 NLRB 786, fn. 1 (1976), enfd. 560 F.2d 1370 (9th Cir. 1977).

That, of course, does not dispose of the allegations of the complaint, for Board law makes clear that an increase may not be given while negotiations are in process and no impasse has been reached. See, e.g., *Winn-Dixie Stores, Inc.*, 243 NLRB 972 (1979). Again, the parties are generally in agreement about the law pertaining to impasse. The duty to bargain in good faith, protected under Section 8(a)(5) of the Act, is defined by Section 8(d) as the duty "to meet . . . and confer in good faith with respect to wages, hours and other terms and conditions of employment." An "employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate . . . ." *N.L.R.B.* v. *Benne Katz, et al., d/b/a Williamsburg Steel Products Company*, 369 U.S. 736, 743 (1972); and the duty to bargain does not require parties to agree or to engage in "fruitless marathon discussions." *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395, 404 (1952).

Further, the parties cite as the touchstone in the resolution of the often difficult question of whether the facts of a particular case justify a finding of impasse, the

[3] At various negotiations sessions, one, two, or three mediators were present. They shall be collectively referred to as "mediator."

Board's holding in *Taft Broadcasting Company*, 163 NLRB 475, 478 (1967), which states:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The General Counsel contends that there can be no impasse where, as a result of very little or no discussion, the parties have reached only the primary state of bargaining. Without reviewing in detail the contents of each and every bargaining session up to May 8, it is readily apparent that what little discussion took place was solely the result of the Union's conduct. Indeed, the General Counsel concedes that "as a result of Lickert's altercation with Hewitt on February 18, Respondent was legally entitled to refuse to meet with" him, but further contends that that did not release Respondent from its bargaining obligations with any other union representative.

The difficulty with this argument is that no other union representative came forth to deal face-to-face with Respondent's representatives.[4] As a result, negotiations had barely progressed and the parties were far apart regarding almost all issues, with no hope of movement unless and until the Union produced a negotiator to deal with demands then on the table. This is not to say that whenever, for purposes of mediation, parties are separated into different rooms and a mediator is entrusted with carrying messages from one to the other, there must be an impasse. But it is obvious here that nothing was to be gained by mediation until the parties gave collective bargaining a chance to work. Lickert's actions prevented that from happening and, in the circumstances of this proceeding, all parties knew that their efforts at negotiation were for naught. I find, further, that the Union had exhibited bad faith, and, as a result of that, an impasse existed.

In so doing, I have credited the testimony of Hewitt and Janet Maxwell, Respondent's administrator, both of whom testified that at the meeting of April 4 Respondent submitted its complete package in order to settle the dispute before the Union struck. It seems most improbable that Respondent would wait until late April to resolve the crisis, as the General Counsel's witnesses testified. Indeed, they admitted that the April 4 session was called at Respondent's insistence. I also credit the narration of Hewitt and Maxwell that Hewitt told the mediator on April 30 that Respondent needed to hire additional help and that the Union should clearly understand that wages were going into effect once replacements were hired. Lickert and one employee testified that there was no meeting on April 30, but that there had been a meeting on April 25 and that the mediator had never told them that Respondent intended to implement its wage offer. I reject that testimony. Respondent's witnesses adequately explained that on April 24, 25, and 28, an injunction proceeding was in progress to restrain the Union's picketing and that no negotiations took place on April 25. Further, inasmuch as I credit both Maxwell and Hewitt, I find it unlikely that the mediator would not have relayed Respondent's message to the Union. In any event, assuming, *arguendo*, that the mediator did not do so, that failure was due to the Union's unwillingness to produce a negotiator to meet directly with Respondent so that the message could be given directly.[5]

Accordingly, I dismiss the complaint's allegation that Respondent violated Section 8(a)(5) of the Act by increasing wages pursuant to its last offer without having afforded the Union an opportunity to negotiate and bargain to impasse.

In May, the Union requested Foreman to be its principal negotiator. From May 21, the time that Foreman first appeared at negotiations, Respondent had no trouble in dealing directly with Foreman; and it appears that negotiations, though difficult, were making some progess. The General Counsel's contention, however, is that the progress facially indicated by the testimony was in reality Respondent's "surface" bargaining. In support, the complaint alleges three specific bargaining proposals which were intended to doom any thought that agreement would be reached—that on September 9 Respondent presented as its "final" position (1) a contract to expire on January 31, 1981, 3 weeks after the end of the certification year, in contrast to Respondent's prior position that it desired a 3-year contract; (2) that union initiation fees be limited to $10 and dues, to 2 hours of pay per month, a nonmandatory subject of bargaining; and (3) that employees be given fewer holidays than those which were currently received by employees in contrast to prior positions taken in negotiations.

There is no question that by letter of September 9 Hewitt sent the Union Respondent's "final" proposals regarding numerous provisions which had not been agreed to by the parties. Included among them were "length of contract until January 31, 1981" and the following provision relating to union security:

> *Section 1.* Membership in the Union is not compulsory. Employees have the right to join, not to join, maintain, or drop their membership in the Union as they see fit. Neither party shall exert any pressure on, nor discriminate against, any employee as regards such matters.

[4] Union Secretary-Treasurer Frank Mastre testified only that no representative of Respondent offered to meet with him and that he did not refuse to meet with Respondent. However, this is not to the point. The duty to bargain requires each party to meet and confer in good faith with the other. It was the Union's obligation to have present a representative to bargain on its behalf, not the Employer's obligation to ask the Union to produce such a representative.

[5] The General Counsel contends that Timothy Hewitt told the Union's attorney, Herman L. Foreman, that Respondent would not negotiate with Lickert *and* Mastre. Respondent's explanation is that it would not meet with Lickert *and* anybody together and that such statement was not intended to mean that Respondent would not meet with Mastre alone. Assuming, *arguendo*, that Respondent's interpretation is incorrect, there was no showing that Foreman told Lickert and Mastre about Timothy's statement and that the Union relied upon it in not proposing Mastre as its representative.

*Section 2.* Union initiation fees are limited to ten dollars ($10.00) and dues are limited to two (2) hours of pay per month.

Respondent's brief does not contest that section 2 is a nonmandatory subject of bargaining in that it has no relationship to employees' terms and conditions of employment and involves only internal union affairs, *Betra Manufacturing Company*, 233 NLRB 1126, 1135 (1977), enfd. 628 F.2d 1357 (9th Cir. 1980); and that, as a matter of law, a party to negotiations engages in bad-faith bargaining by advancing a nonmandatory subject of bargaining to impasse. *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958). Its brief also concedes that, when its "final" proposals were made, and when Foreman replied by letter dated September 16 that all of the Union's prior concessions were withdrawn, the parties were at impasse; and it does not contest the General Counsel's contention that a proposal for an agreement of approximately 4-1/2 months' duration is evidence of bad-faith bargaining. *Deister Concentrator Company, Inc.*, 253 NLRB 358, 359 (1980). Because the parties held further negotiations on October 16 and November 7, and Respondent's proposals never changed, the term of the agreement became less and less, and with Respondent's apparent refusal to meet with the Union in December, its proposal, unsupported by any rationale, was clearly not intended to be conducive to settlement, especially because Respondent had earlier insisted and, at hearing, was still insisting that it desired a 3-year agreement and the timing of its later proposal of a shorter duration was linked closely with the end of the Union's certification year. *F. Strauss and Son, Inc.*, 216 NLRB 95 (1975), enfd. 536 F.2d 60 (5th Cir. 1976).

Respondent, however, argues that both proposals were proper because they were interposed merely as part of a bargaining strategy, Respondent was not sincere about them, and the Union well knew it. The accuracy of these contentions rests, in substantial part, upon my assessment of the credibility of the various witnesses. Although I credited Hewitt and Maxwell, *supra*, I do not do so on these points.[6] It is clear that from the commencement of negotiations, Respondent vehemently opposed any union-security provision, while the Union demanded the provision with equal intensity. At the first session on February 4, Hewitt asked about the Union's dues and fee structure; and when Lickert replied that initiation fees were $150, Hewitt stated that such high fees would impede Respondent in hiring employees, particularly part-timers, who would have difficulty, because of their low wages, in paying such fees. At Foreman's first session on May 21, Hewitt raised the same claim and testified that Foreman agreed to commit to writing that the Union would extend the payment of fees over a period of time. Hewitt stated that if Foreman did so, it would solve Respondent's problem. Foreman then and on July 9 made clear, however, that union dues and initiation fees were solely matters of concern to the Union, and he would not bargain about them.

The gist of Respondent's argument is that its proposal limiting fees *and* dues was not intended to mean what it says. However, I find Hewitt's explanation entirely improbable and discredit it. The above-quoted provision on union security was first proposed on April 4, and never varied. If Respondent opposed any form of union security, as I believe it did, then Respondent had no additional right to interject itself into the Union's internal affairs. If the agreement contained no provision requiring union membership or payment to the Union, Respondent's proposal limiting fees and dues not only is of no concern to Respondent, but also must have been offered to ensure that agreement would not be reached and that bargaining would fail. *N.L.R.B.* v. *Herman Sausage Company, Inc.*, 275 F.2d 229 (5th Cir. 1960); *Cable Vision, Inc.*, 249 NLRB 412 (1980). Clearly, there is no "either/or" effect which may be given to Respondent's proposal—that is, either the agreement does not require employees to join the Union and pay it dues and fees, in which event Respondent should not care anything about what members pay the Union; or the agreement has a union-security provision, in which event Respondent might have some concern. Nor was Respondent's proposal aimed at what it claims was legitimate: that is, Hewitt testified that he would be satisfied with Foreman's supply of a letter regarding apportionment; but the proposal seeks not apportionment of initiation fees ($150), but limitation of them to $10 *and* dues to 2 hours' pay per month. Further, I do not credit Hewitt's self-serving statement that he had told the mediator that this was not an impasse item. Hewitt was, to be sure, glib as a witness, but not wholly credible. Rather, I credit Foreman's testimony. I conclude that Respondent's proposal, concededly on a nonmandatory subject of bargaining, violated Section 8(a)(5) of the Act and evidenced Respondent's bad faith in its entire dealings with the Union.[7]

Respondent's proposal regarding duration of agreement had a checkered history. At first, the parties were apart, Respondent wanting a 3-year agreement and the Union proposing a 1-year agreement, which it later was willing to extend provided a cost-of-living provision were added. On May 21, when Foreman insisted that the Union still wanted a term of 1 year, Hewitt replied that if Lickert wanted a short contract, Respondent would

[6] As stated in *N.L.R.B.* v. *Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950): "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all."

[7] Maxwell testified that on October 16 Respondent offered the Union a provision for maintenance of membership, with a yearly "window period" whereby employees could resign from the Union; and that Foreman rejected this compromise. Maxwell also testified that the same offer was made on November 7, after Respondent's representatives caucused on the matter. It appears improbable that Respondent's representatives would have to meet privately to decide to offer the very same proposal that had been previously made. Hewitt denied that union security was discussed at this meeting. I credit Foreman's denial that any counteroffer was made. Assuming, however, that such a proposal was made, Respondent's proposal for limiting union dues and initiation fees still would be a nonmandatory subject of bargaining because employees, under the counterproposal, had their choice of maintaining their union membership. The same finding is equally applicable to the suggestion raised by Respondent's counsel, in a letter to the Regional Office, that Respondent's proposal was directed to the Union's desire for a checkoff. Again, whether employees wish to voluntarily authorize dues deductions in various amounts is of no concern to Respondent.

make it 6 months. From that point, the parties seemingly reversed positions, Foreman objecting that by the time the parties completed negotiations, they would have to begin negotiations all over again. The termination date of the prospective agreement was not discussed at negotiations held on July 9 nor on August 27, when the parties used as the basis for their agreement, a contract between another union and Mountain View Medical Facilities, Inc., and reviewed each article, clause by clause. Foreman made various changes on the contract and stated that he would reduce all agreements to writing and prepare the same for the next meeting.

On September 8, the parties again met. Foreman presented to Hewitt a copy of his draft agreement as promised. They proceeded to go over, item by item, the areas of agreement and disagreement. With respect to the termination date, Hewitt objected that he did not agree to a 2-year, 7-month contract term (which was a copy of Mountain View's language) and that he wanted only 4 months. Further, Hewitt was furious because he thought that he had agreed that Foreman was to give Respondent the Mountain View contract, except where clauses had otherwise been agreed to by the parties; and that Foreman was revising the contract for the benefit of the Union and in violation of his commitment.[8] Numerous proposals were not agreed upon, and the meeting ended with Foreman's request of Hewitt for Respondent's final position, which resulted in Hewitt's September 9 letter.

Foreman was equally incensed with that letter as Hewitt had been with Foreman's proposal, and wrote to Hewitt on September 16, rescinding all prior compromises made by the Union during the course of negotiations. Respondent was represented at the next two negotiating sessions held on October 16 and November 7 by different counsel.[9] At the second session Foreman stated that Respondent's position regarding the termination of the agreement was foolish and that, pursuant thereto, the parties should be beginning negotiations for a new contract. Respondent's counsel replied that he was instructed not to amend the final proposal. No further negotiating sessions were held to the time of the hearing herein, despite Foreman's attempts to schedule another session. Finally, on January 13, 1981, a meeting was scheduled for January 19. However, on January 15, Foreman was advised by the mediator that Respondent had received a petition from its employees asking for a decertification election and that Respondent would not negotiate any more.

It is difficult to predict the course of negotiations or to assess what actually are the motives in proposing certain demands. Here, Hewitt testified that he proposed the extremely short duration clause to push the Union into conceding Respondent's original demand for 3 years. On the other hand, Hewitt testified that the term of 3 years was never really an issue and that he always thought that he and Foreman would be able to agree—all to justify the argument that Respondent's proposal did not mean what it clearly states. At yet another point of his testimony, however, Hewitt stated that one of the big turning points of negotiations (he thought) was when Foreman, on August 27, finally agreed to the 3-year agreement which Hewitt had been insisting upon. That commitment was coupled with Foreman's alleged assertion that the Union would also agree to withdraw its insistence that six discharged strikers would have to be reinstated, also a major stumbling block to ultimate agreement. Although Maxwell corroborated this latter statement, she never mentioned Foreman's agreement to a 3-year term, which I find was not made.

I conclude that Hewitt's shifts in his testimony are unreliable and, in light of Foreman's general credibility, I find that the duration of the agreement was very much an issue. Respondent's holding firm to such a short contract duration was an indicia of its bad faith. The General Counsel also contends that its final proposal regarding holidays was also made in bad faith, but actually Respondent insisted upon the clause taken from the Mountain View contract, which called for more holidays than those given by Respondent, if the agreement lasted for a year or more. That the holidays were reduced by reason of Respondent's proposal of a contract for a few months is the fault of the latter proposal, and not the holiday provision. Finally, merely because Respondent offers a proposal less beneficial than its current practice is not an indicia of bad faith. Nor does a comparison between Respondent's April 4 proposal and that of September 9 lead to a different conclusion. The General Counsel argues that it represents a step backwards, eliminating holidays already proposed by Respondent. It is true that in the April 4 proposal Respondent offered five named holidays plus three floating holidays for employees who had 1 year of employment. Its September 9 proposal offered only three named holidays, plus three floating holidays effective April 22, 1981, in addition to the three floating holidays for employees who had more than a year of service. However, the two named holidays which were eliminated by its proposal were Memorial Day and Labor Day, both of which fell after April 22, 1981. In a contract of reasonable duration, the effect of Respondent's proposal was not to reduce its prior offer, but to increase it by one holiday. I, accordingly, dismiss this particular allegation.

The General Counsel's final claim is that, based on the totality of Respondent's actions, Respondent engaged in bad-faith bargaining. In support, she narrows her sights on a series of incidents, ranging from Hewitt's being unprepared for the August 27 meetings by not bringing his Mountain View contract, to his failure to make enough progress at some meetings, to his failure to bring his principals to certain meetings, and finally, to his reliance often on the Mountain View language, when he was also pressing for different positions. An overview of negotiations reveals a vastly different scene—both Foreman and Hewitt were convinced that by September negotiations had narrowed to certain issues—Foreman, whom I credit, announcing on both October 16 and November 7

[8] It appears that Hewitt's claim was not totally unfounded. In one clause, Foreman changed the word "employer" to "employee"—a result, he stated, of inadvertence; but I find it purposeful. It is clear that in his submission, Foreman was still negotiating, as was Hewitt in his replies on September 8.

[9] Hewitt testified that he thought his personal participation was impeding the progress of negotiations and felt it best, for the benefit of his client, that he step aside.

that only union security, length of agreement, wages, and reinstatement of strikers separated the parties, and that if these matters were settled, the remainder of the agreement would fall into place. Hewitt and Maxwell both insisted Foreman mentioned only two items, reinstatement of strikers and union security.

From Foreman's perspective, therefore, negotiations had succeeded to the point where, if the major items could be resolved, the remainder of disputes would quickly disappear. That there were so many items left was not the fault solely of one negotiator or the other. Both made their contributions, and I am convinced that Lickert's earlier actions, the Union's apparently unsuccessful strike, and charges by Respondent against the Union of picket line violence created circumstances which made bargaining exceedingly difficult, perhaps beyond the capacity of any negotiator to fully control.

The fact remains that three of the four impasse items were directly or indirectly caused or contributed to by Hewitt—union security, by the attempted interference with the Union's dues and initiation fee structure; duration of contract, by the proposal that the contract terminate on January 31, 1981; and wages, by the failure of Hewit to explain to Foreman that wages had already been increased. The fourth item, reinstatement of employees, was tentatively settled at one point by agreement of Foreman, who ultimately could not deliver on his offer. All of these were items of impasse, and Board law makes clear that if the parties have impassed on several proposals, only one of which is a nonmandatory demand, the party proposing the latter is not bargaining in good faith. *National Fresh Fruit & Vegetable Company and Quality Banana Co., Inc.*, 227 NLRB 2014, 2015 (1977), enforcement denied 565 F.2d 1331 (5th Cir. 1978).

Respondent, however, relying upon *Latrobe Steel Co. v. N.L.R.B.*, 630 F.2d 171 (3d Cir. 1980), contends that the impasse would have occurred notwithstanding its actions, for the parties were clearly deadlocked on the issue of reinstatement of strikers. With some movement on the other items of impasse and without Respondent's actions, it cannot be said that agreement would not be reached. I find Respondent's argument entirely speculative. In addition, its reliance on *Latrobe Steel* is inaccurate. There, the court held that the employer could not insist upon the presence of a stenographer at bargaining sessions because its proposal was not a mandatory subject of bargaining and could not be interposed as a condition precedent to entering an agreement. 630 F.2d at 179. It enforced the Board's bargaining order. The Board had also held that two other proposals of the employer were nonmandatory subjects of bargaining, but the court felt it unnecessary to decide whether they were. Instead, the court found that the union's insistence throughout negotiations upon the adoption by the employer of the basic industry agreement caused the impasse to occur, even in the absence of any other proposal, and found that the union's strike was not an unfair labor practice strike. The court stated, 630 F.2d at 180: "While it is true that insistence on non-mandatory proposal, need not be the sole cause of the impasse in negotiations, it must be a cause of the impasse"; and, further, 630 F.2d at 181, fn. 9: "Any dispute on a mandatory subject is not sufficient to protect a party's insistence to the point of impasse on a non-mandatory subject. The dispute over the non-mandatory subject must itself rise to the level of impasse." Here, Respondent's proposals for an agreement of limited duration and incursion into the Union's internal affairs were both causes of the impasse and had risen to the level of impasse.[10] Accordingly, *Latrobe Steel* supports the conclusion that Respondent has engaged in unfair labor practices under Section 8(a)(5) and (1) of the Act, which have a close, intimate, and substantial effect on interstate commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that Respondent be required to cease and desist from engaging in such unfair labor practices and, upon request, order it to bargain collectively with the Union.

Because Respondent's failure to bargain in good faith has deprived the Union of the full year of good-faith bargaining to which it was entitled under its certification and because it is desirable and no more than fair to place Respondent and the Union in as nearly the same situation as possible to that which existed before Respondent unlawfully ceased bargaining in good faith, I shall recommend that the certification year be extended for a period of 4 months[11] from the date when Respondent in compliance with the recommended Order herein begins to bargain in good faith with the Union as the recognized representative of the employees in the appropriate unit. *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Stan Long Pontiac, Inc.*, 175 NLRB 433 (1969), enfd. 434 F.2d 1050 (6th Cir. 1970); *Beglinger-Massie Oldsmobile-Cadillac, Inc.*, 177 NLRB 161 (1969), enfd. 434 F.2d 1047 (6th Cir. 1970).

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[12]

The Respondent, Harry Sann, Jr. and Winton R. Wagner, Partners, d/b/a Briarcliff Pavilion for Special-

[10] Even if I credited Respondent's testimony that only reinstatement of strikers and union security were at impasse, the conclusion would be the same.

[11] The extended period is based on the fact that impasse was reached on the critical issues herein on September 9, 1980. Although the General Counsel contends that the bargaining period should be extended for 12 months, time should not be credited for the period when the Union did not produce a representative at the bargaining table or when Foreman and Lickert were engaged in good-faith bargaining.

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ized Care, North Huntingdon, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively in good faith with Service Personnel and Employees of the Dairy Industry, Teamsters Local Union No. 205 of Pittsburgh, Pennsylvania, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the certified collective-bargaining representative of all of its full-time and regular part-time housekeeping employees, laundry employees, dietary employees, nurses' assistants and physical therapy aides, who are employed at its North Huntingdon, Pennsylvania, facility; excluding office clerical employees, maintenance, licensed practical nurses, registered nurses, students and guards, other professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Upon request, bargain collectively in good faith with the Union as the certified collective-bargaining representative of the employees in the unit set forth in section 1(a) of this Order, with respect to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Huntingdon, Pennsylvania, facility copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

3. For the purpose of determining the duration of the Union's certification as the representative of Respondent's employees in the appropriate unit, the certification period is hereby extended to a date 4 months from the date Respondent commenced or commences to bargain in good faith with the Union.

IT IS FURTHER ORDERED that the complaint herein be dismissed insofar as it alleges violations of the Act not specifically found herein.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to bargain collectively in good faith with Service Personnel and Employees of the Dairy Industry, Teamsters Local Union No. 205 of Pittsburgh, Pennsylvania, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the certified collective-bargaining representative of all of our full-time and regular part-time housekeeping employees, laundry employees, dietary employees, nurses' assistants and physical therapy aides, who are employed by us at our North Huntingdon, Pennsylvania, facility; excluding office clerical employees, maintenance, licensed practical nurses, registered nurses, students and guards, other professional employees and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees described above, and, if an understanding is reached, WE WILL embody that understanding in a signed agreement.

HARRY SANN, JR. AND WINTON R. WAGNER, PARTNERS, D/B/A BRIARCLIFF PAVILION FOR SPECIALIZED CARE